MAY A WIFE MAINTAIN AGAINST A MALE AN ACTION FOR THE ALIENATION OF HER HUSBAND'S AFFECTIONS?—The gist of an action for the alienation of affections is necessarily the loss of *consortium*.[1] It is settled law that a husband may maintain this action.[2] Upon principle in this day of emancipation of married women why should not the wife be permitted to enforce the reciprocal right? And why not as well against a male as a female? This the Supreme Court of Maine has recently denied.[3]

It is perhaps not surprising that there are no conclusive common law precedents upon this question, for the completeness of the unity of husband and wife, the absolute legal subjugation of the wife, the necessity of joinder of the husband in any action by the wife, together with the fact that any damages recovered for torts committed against her became at once the property of the husband, were not conducive to suits by wives against persons depriving them of the conjugal society of their husbands. The machinery of the common law was not adequate or effective in offering them a remedy of practicability.

On principle the right ot each spouse to the society and companionship of the other is undeniable as resulting from the contract of marriage and the status thereby produced.[4] Therefore, likewise upon principle, since this is a right inherent in each, any act of another depriving either party to the marriage of this *consortium* is in fact a personal tort and should be capable of redress in damages.[5]

The earliest case considering this proposition is of interest as shedding light on the attitude of the common law toward the *right* of the wife to *consortium*. In *Lynch* v. *Knight*,[6] an action of slander upon words not actionable *per se* was brought against a male by a wife, joining her husband for form, alleging as special damages the loss thereby of her husband's conjugal society and the comforts of his home. Demurrer to the declaration was sustained on the ground that the husband's acts were not the natural and probable result of the words. Though the question was only collaterally considered, two lords stated in the judgments that the

[1] Rott *v.* Goehring, 33 N. D. 413, 157 N. W. 294, L. R. A. 1916E, 1086 (1916); Rinehart *v.* Bills, 82 Mo. 534, 52 Am. Rep. 385 (1884); Bigaouette *v.* Poulet, 134 Mass. 123, 45 Am. Rep. 307 (1883); Weeden *v.* Timbrell, 5 T. R. 357, 101 Eng. Reprint 199 (1793).

[2] Fratini *v.* Caslini, 66 Vt. 273, 29 Atl. 252, 44 Am. St. Rep. 843 (1894); Callis *v.* Merrieweather, 98 Md. 361, 57 Atl. 201, 103 Am. St. Rep. 404 (1904); Winsmore *v.* Greenbank, Willes, 577, 125 Eng. Reprint 1330 (1745); Macfadzen *v.* Olivant, 6 East, 387, 102 Eng. Reprint 1335 (1805).

[3] Howard *v.* Howard (Me.), 115 Atl. 259 (1921).

[4] Foot *v.* Card, 58 Conn. 1, 18 Atl. 1027, 18 Am. St. Rep. 258, 6 L. R. A. 829 (1889); Clow *v.* Chapman, 125 Mo 101, 28 S. W. 328, 46 Am. St. Rep. 468 (1895); TIFFANY, DOM. REL. (2nd ed.) 84; 1 JAGGARD, TORTS, 468; 21 CYC. 1618.

[5] Bennett *v.* Bennett, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553 (1889); Smith *v.* Smith, 98 Tenn. 101, 38 S. W. 439, 60 Am. St. Rep. 838 (1896).

[6] 9 H. L. Cas. 577, 11 Ir. Jur. N. S. 724, 11 Eng. Reprint 854 (1861).

right to *consortium* was not confined to the husband, and one denied the right in the wife because of the futility of the action, since the husband was interested on both sides of the case and because any recovery became at once his property. This case, both by *dictum* and inference, distinctly acknowledges that to deprive the wife of the society of her husband is a personal tort; for she was denied recovery, because "looking to the frame of the declaration, the loss or special damage relied upon is not the natural and probable consequence of * * * the speaking of the slanderous words" —which implies nothing less than that, had such been the probable consequence, there would have been a recovery, thus admitting the existence of the tort, and therefore of necessity the right. In the same case Lord Chancellor Campbell said:

> "Although this a case of first impression, if it can be shown that there is presented to us a concurrence of *loss* and *injury* from the act complained of, we are bound to say that this action lies. Nor can I allow that the loss of *consortium,* or conjugal society, can give a cause of action to the husband alone. * * * But the loss of conjugal society is not a pecuniary loss, and I think it may be a loss which the law may recognize, to the wife as well as to the husband."

Such is then the basis upon which the question rests at common law. The existence of the right in the wife has always been recognized and enforced in the Ecclesiastical Courts in suits by the wife for the restitution of conjugal rights.[7] The actual difficulty preventing the enforcement by the wife of this right existing at common law was her inability to sue alone, the free and beneficial exercise of which existent right only awaited the removal of that obstacle by the statutes emancipating married women and allowing them to sue as if sole.[8] Therefore the situation at common law may be admittedly summed up: (a) the right existed; (b) the remedy was futile and impracticable.

In America generally the right of the wife to maintain the action indiscriminately against male or female is recognized by the overwhelming weight of authority.[9] In the small minority of two

[7] Orme *v.* Orme, 2 Add. Ec. 382, 2 Eng. Ec. 354; Burroughs *v.* Burroughs, 2 Swabey & T. 303; Yelverton *v.* Yelverton, 1 Swabey & T. 574, 6 Jur. N. S. 24, 29 L. J. P. & M. 34, 1 L. T. Rep. N. S. 194, 8 Wkly. Rep. 134; Firebrace *v.* Firebrace, L. R. 4 Prob. Div. 63, 47 L. J. P. & ADM. 41, 39 L. T. Rep. N. S. 94, 26 Wkly. Rep. 617 (1878); Reg. *v.* Jackson, 1 Q. B. 671, 685 (1891); 3 BL. COM., 94; 21 Cyc. 1149, note 50.

[8] Bennett *v.* Bennett, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553 (1889); Smith *v.* Smith, 98 Tenn. 101, 38 S. W. 439, 60 Am. St. Rep. 838 (1896); Clow *v.* Chapman, 125 Mo. 101, 28 S. W. 328, 46 Am. St. Rep. 468 (1895). And see cases cited *infra,* note 9.

[9] Sims *v.* Sims, 79 N. J. Law 577, 76 Atl. 1063, 29 L. R. A. (N. S.) 842 (1910); Nolin *v.* Pearson, 191 Mass. 283, 77 N. E. 890, 4 L. R. A. (N. S.) 643 (1906); Clow *v.* Chapman, 125 Mo. 101, 28 S. W. 328, 46 Am. St. Rep. 468 (1895); Westlake *v.* Westlake, 34 Ohio St. 621, 32 Am. Rep. 397 (1878); Bennett *v.* Bennett, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A.

States alone Maine and Wisconsin, the action is denied.[10] New Jersey was to be found in this class until the recent case of *Sims* v. *Sims*,[11] where damages for the alienation of the husband's affections were recovered by the wife against a male. This repudiation of the former attitude came after the passage of the usual statute allowing married women to sue in their own names for personal torts. The latest case in Wisconsin was decided by a strongly divided court.[12] Undoubtedly the doctrine of *stare decisis* had great influence.

The course which Maine has pursued in this regard, as being both unusual and without reason, is the subject of particular interest herein. In 1876 an emancipation act for married women was passed in usual form found in most of the States, providing that:

> A married woman "may prosecute and defend suits at law or in equity, either in tort or in contract, in her own name, without joinder of her husband, for the preservation and protection of her property and personal rights, or *for the redress of her injuries, as if unmarried*, or may do it jointly with her husband." (Italics ours.)[13]

This statute in derogation of the common law has been so strictly construed that it is consistently held to apply only to cases where "the husband may be a party with the wife or not, at her election",[14] thus limiting its application to cases where the wife might have sued at common law by joining her husband. Yet with this construction it cannot be seen how the right of the wife to sue for the alienation of her husband's affections can be further denied logically after such a statute and such a decision, when the exercise at common law of the existent right was only impeded by the futility and usefulness of the results obtained by the necessitated joinder of the husband.[15] This seems rather to bring the case directly within this strict interpretation of the statute and clearly within its purpose.

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533 (1889); Foot *v.* Card, 58 Conn. 1, 18 Atl. 1027, 6 L. R. A. 829, 18 Am. St. Rep. 258 (1889); Seaver *v.* Adams, 66 N. H. 142, 19 Atl. 776, 49 Am. St. Rep. 597 (1890); Haynes *v.* Nowlin, 129 Ind. 581, 29 N. E. 389, 14 L. R. A. 787, 28 Am. St. Rep. 213 (1891); Knapp *v.* Wing, 72 Vt. 334, 47 Atl. 1075 (1900); Bassett *v.* Bassett, 20 Ill. App. 543 (1886); Warren *v.* Warren, 89 Mich. 123, 50 N. W. 842, 14 L. R. A. 545 (1891); Bailey *v.* Bailey, 94 Iowa, 598, 63 N. W. 341 (1895); Hodgkinson *v.* Hodgkinson, 43 Neb. 269, 61 N. W. 577, 27 L. R. A. 120, 47 Am. St. Rep. 759 (1895); Humphrey *v.* Pope, 122 Cal. 253, 54 Pac. 847 (1898); Brown *v.* Brown, 121 N. C. 8, 27 S. E. 998, 38 L. R. A. 242 (1897).

[10] Howard *v.* Howard (Me.), *supra*, note 3; Doe *v.* Roe, 82 Me. 503, 20 Atl. 83, 8 L. R. A. 833, 17 Am. St. Rep. 499 (1890); Morgan *v.* Martin, 92 Me. 190, 42 Atl. 354 (1898); Farrell *v.* Farrell, 118 Me. 441, 108 Atl. 648 (1920); Duffies *v.* Duffies, 76 Wis. 374, 45 N. W. 522, 20 Am. St. Rep. 79, 8 L. R. A. 420 (1890); Lonstorf *v.* Lonstorf, 118 Wis. 159, 95 N. W. 961 (1903).

[11] 79 N. J. Law 577, 76 Atl. 1063, 29 L. R. A. (N. S.) 842 (1910).

[12] Lonstorf *v.* Lonstorf, 118 Wis. 159, 95 N. W. 961 (1903).

[13] R. S. 1916, c. 66, sec. 5.

[14] Hobbs *v.* Hobbs, 70 Me. 381 (1879); Libby *v.* Berry, 74 Me. 286, 43 Am. Rep. 589 (1883).

[15] See cases cited in note 9.

It was later held in the case of *Doe* v. *Roe*,[16] that no action would lie by the wife against another woman for carnally debauching the husband and thereby alienating his affections. The opinion by Walton, J., covers scarcely a page, cites no authority, and shows no evidence of any consideration of the question, but rests the decision upon the "fear" that to allow such an action to wives "would furnish them with the means of inflicting untold misery upon others, with little hope of redress to themselves," and suggests divorce as a suitable remedy. In a later case [17] *Doe* v. *Roe* was affirmed in an opinion of twenty lines by Strout, J., in which it is said:

> "We are aware that in some jurisdictions it is held otherwise, but we are satisfied with the reasons given in that case (*Doe* v. *Roe*) and adhere to them."

By statute in 1913 [18] an action was allowed the wife against any female person over eighteen years, who should debauch, alienate the affections of, etc., her husband. This expression of the legislative will the court in *Farrell* v. *Farrell*,[19] took as a stronger reason for denying the right of action against the wife's father-in-law for depriving her of the conjugal society of her husband. The distinction between male and female had not before arisen in the jurisdiction. The opinion declared that the strict interpretation of the statute in derogation of the common law barred an action against males, and merely cites the act of 1913. This case was affirmed by the recent case of *Howard* v. *Howard*,[20] decided Nov. 15, 1921, upon identical facts, with the statement that "the law therefore is firmly established in this State, and we see no reason to over-rule this *long line* of decisions," proving that the court preferred to be consistent rather than right.

The cases in all other jurisdictions are indiscriminate as to the matter of male or female defendants.[21] Wisconsin, the sole accessory with Maine in this headstrong policy of protecting the right to deprive a woman of her husband's conjugal society without fear of an action for damages makes no such distinction, idiotic on principle.[22]

It is therefore submitted that the recent decision in *Howard* v. *Howard* is contrary to principle and justice, the weight of authority, and to the very statute of the State which permits a wife to sue alone in her own name, as if unmarried, to redress her wrongs, and shows merely a dogged intention of the court to persist in an error committed thirty-one years ago.

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[16] *Supra*, note 10.
[17] Morgan *v.* Martin, 92 Me. 190, 42 Atl. 354 (1898).
[18] Pub. L. 1913, c. 33; R. S. 1916, c. 66, sec. 7.
[19] 118 Me. 441, 108 Atl. 648 (1920).
[20] 115 Atl. 259 (1921).
[21] See cases cited in note 9.
[22] See notes 10, 12.